

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAY M. PAYNE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>COPP TRANSPORTATION</b>	)	
Respondent	)	Docket No. 268,622
	)	
AND	)	
	)	
<b>INSURANCE COMPANY OF THE WEST</b>	)	
<b>GROUP, COMMERCE &amp; INDUSTRY</b>	)	
<b>INSURANCE COMPANY, CONTINENTAL</b>	)	
<b>WESTERN INSURANCE COMPANY and</b>	)	
<b>TIG INSURANCE COMPANY</b>	)	
Insurance Carriers	)	
	)	
<b>KANSAS WORKERS COMPENSATION</b>	)	
<b>FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund (Fund) requested review of the December 21, 2006, preliminary hearing Supplemental Preliminary Order on Disputed Claim entered by Administrative Law Judge Robert H. Foerschler.

**ISSUES**

The Administrative Law Judge (ALJ) ordered the Fund to "assume the temporary initiative to continue claimant's treatment as needed, subject to such circumstances as later develop, including the right of subrogation."<sup>1</sup>

The Fund contends (1) The ALJ did not have jurisdiction to enter this supplemental order, as preliminary decisions were previously made on June 9, 2003, and December 16, 2004, and no change of benefits regarding medical treatment or payment of temporary

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<sup>1</sup> ALJ's Supplemental Preliminary Order on Disputed Claim, filed Dec. 21, 2006, at 3.

total disability compensation had been requested; (2) that pursuant to K.S.A. 44-532a, only an injured worker can apply to the Director for an award of benefits from the Fund, and in this matter, the injured worker did not do so; (3) the ALJ erred in finding it liable for benefits to the claimant when there were no findings of the employer's financial ability to make payments; (4) the ALJ erred in changing liability for payment of benefits in this matter because the moving parties failed to meet their burden of proof under K.S.A. 44-508(g); (5) the Fund and respondent were denied their due process rights; and (6) the ALJ's award was not sufficient under K.S.A. 44-569.

Claimant made no argument in this appeal since the issues concerned not whether he is entitled to benefits, but what entity is liable to pay those benefits.

Respondent and its insurance carrier Commerce & Industry Company (Commerce) argue: (1) the Fund has failed to assert a claim that is reviewable by the Board under K.S.A. 44-534a; (2) the ALJ was within his authority to order the Fund to pay benefits since K.S.A. 44-534a(a)(1) provides that either the employer or the employee may make an application for preliminary hearing on the issue of furnishing of medical treatment; (3) the Fund was properly impleaded as a party pursuant to K.S.A. 44-566a(c)(1); (4) the Fund was not denied due process of law because counsel for the Fund was present at the preliminary hearing held November 30, 2006, and the Fund submitted a brief setting forth its position at the close of the hearing; and (5) the ALJ's finding of a date of accident of February 28, 2004,<sup>2</sup> should be affirmed.

Respondent and its insurance carrier, Continental Western Insurance Company (Continental) join in the brief of respondent/Commerce.

Respondent and its insurance carrier, Insurance Company of the West Group (West Group) contend the Board has jurisdiction to hear this appeal. Further, respondent/West Group argues the issues before the ALJ at the preliminary hearing on November 30, 2006, were premised on a demand for change in benefits, *i.e.*, respondent's liability to pay benefits; that whether an injured worker initiates a preliminary hearing proceeding is irrelevant as to the court's jurisdiction to determine Fund liability; that there was sufficient evidence presented at the preliminary hearing to provide a basis for the ALJ to enter a preliminary award against the Fund; and that the Fund's right to due process was not violated. West Group further argues that the legal date of accident in this matter does not fall within its dates of coverage for this respondent and, therefore, West Group is not liable for payment of compensation to claimant.

Respondent as an uninsured employer argues the ALJ was without authority to conduct a preliminary hearing requested by an insurance carrier for the sole purpose of

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<sup>2</sup> The ALJ actually found a date of accident of February 25, 2004. See Supplemental Preliminary Order on Disputed Claim, filed Dec. 21, 2006, at 1.

apportioning liability and, therefore, review by the Board is appropriate. Respondent (uninsured) argues the ALJ's preliminary orders of June 9, 2003, and December 16, 2004, were consistent with *Tull*,<sup>3</sup> but that the ALJ's order of December 21, 2006, is contrary to established law and procedure. Respondent (uninsured) also argues that no evidence was presented at the preliminary hearing that established it was uninsured on claimant's last day worked.

Respondent and its insurance carrier, TIG Insurance Company (TIG) did not file a brief in this appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was an over-the-road truck driver who worked for respondent from 1982 to 1986 and then again from 1992 until February 2004. There is no precise evidence in the record as to what claimant's last date worked was, although he testified that he thought his last day was February 28, 2004. Claimant developed pain in both shoulders in 1998. His Amended Application for Hearing lists a series of accidents "[f]rom on or about June 29, 1998 and each and every day worked thereafter."<sup>4</sup> Claimant was diagnosed with degenerative arthritis in his shoulders in 1999 and was treated conservatively by Dr. Mark Maguire. He continued to work for respondent. However, for several years, claimant was required to self-medicate, using Ibuprofen. Claimant now suffers from kidney failure and is required to undergo dialysis on a regular basis. He is being considered for a kidney transplant.

During the period of time from 1998, respondent was insured by several workers compensation carriers, with some gaps in coverage:

Apr. 1, 1997 to Apr. 1, 1998	Kansas Manufacturers & Commerce SI Fund
Jan. 1, 1998 to Dec. 31, 1998	Kansas Truckers Risk Management Group
Jan. 1, 1999 to May 23, 1999	TIG Insurance Company (TIG)
May 23, 1999 to May 23, 2002	West Group
May 23, 2002 to Nov. 15, 2002	Commerce
Nov. 15, 2002 to Aug. 16, 2003	Continental
Aug. 17, 2003 to Oct. 31, 2003	Uninsured
Nov. 1, 2003 to Dec. 6, 2003	Continental
Dec. 7, 2003 to Dec. 10, 2003	Uninsured

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<sup>3</sup> *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 150 P.3d 316 (2007).

<sup>4</sup> Form K-WC E-1 Amended Application for Hearing, filed Feb. 28, 2003.

Dec. 11, 2003 to Feb. 19, 2004  
Feb. 20, 2004 to Feb. 28, 2004

Continental  
Unknown<sup>5</sup>

Procedurally, the first preliminary hearing in this case was heard on June 5, 2003. The ALJ stated at the preliminary hearing that it was agreed Dr. Craig Satterlee was a suitable specialist to examine and treat claimant. He held that respondent and its four named insurance carriers should pay for claimant's treatment "at their mutual expense for the time being . . . ."<sup>6</sup> This order was appealed to the Board. Respondent and its insurance carriers, West Group, TIG and Commerce claimed that claimant suffered a new injury after their coverage ended and they should not be liable for claimant's treatment. Respondent/Continental asked the Board to modify the order to find another insurance carrier liable for claimant's treatment. The Board dismissed the appeal, stating it did not have jurisdiction to review a preliminary hearing on an issue of liability among multiple insurance carriers.<sup>7</sup>

A second preliminary hearing was held December 9, 2004. After that hearing, the ALJ ordered that claimant's "current medical treatment for his temporary needs be continued by the employer and the involved carriers until a final hearing can be held . . . ."<sup>8</sup> Respondent and two of its insurance carriers, TIG and West Group, appealed the ALJ's Preliminary Decision to the Board. The issues set out in that appeal were whether the ALJ erred in including TIG and West Group as being responsible for claimant's medical treatment, whether claimant's shoulder condition was a result of his employment with respondent, and whether the problem with claimant's kidneys was a result of a work-related injury. The Board held that claimant's shoulder problems and resulting kidney difficulties were caused by his years of working as an over-the-road truck driver. The Board also found that "the ALJ did not exceed his jurisdiction in ordering the cost of claimant's ongoing treatment to be shared among the various insurance carriers until the time of final award."<sup>9</sup>

On May 9, 2005, claimant filed a Notice of Impleading the Fund, alleging that the respondent was uninsured on the date of accident relevant in this case and is or may be financially unable to pay the compensation that could be awarded in the matter.

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<sup>5</sup> The Division's records show Lumbermen's Underwriting as the insurance carrier from December 31, 2003, to December 31, 2004.

<sup>6</sup> ALJ Preliminary Decision dated June 9, 2003, at 1.

<sup>7</sup> *Payne v. Copp Transportation*, No. 268,622, 2003 WL 22401264 (Kan. WCAB Sept. 16, 2003).

<sup>8</sup> ALJ's Preliminary Decision filed Dec. 16, 2004, at 2.

<sup>9</sup> *Payne v. Copp Transportation*, No. 268,622, 2005 WL831899 (Kan. WCAB Mar. 28, 2005).

Thereafter, respondent/Continental filed an Application for Preliminary Hearing requesting a finding on which entity would be responsible for payment of workers compensation benefits to claimant. A hearing on that Application was held November 30, 2006, and appearances were made by counsel for claimant, respondent, the Fund, and insurance carriers Continental, West Group, and Commerce. No appearance was made on behalf of respondent/TIG.

There was no testimony taken at the hearing held November 30, 2006. At the hearing, counsel for respondent/Continental requested the ALJ “point the finger”<sup>10</sup> at one of the carriers to be liable for the costs of the workers compensation benefits. It appears that although all carriers had been ordered to make payments “at their mutual expense,”<sup>11</sup> at least one of the carriers failed and refused to make any payments. Claimant’s attorney indicated that at the present time, none of the carriers were complying with the order to provide medical treatment, although temporary total benefits were still being paid.

Counsel for respondent (uninsured) argued that there was no jurisdiction that would allow a preliminary hearing for the sole purpose of apportioning liability among carriers.

The ALJ was asked to make a ruling as to the last day claimant worked in order to pinpoint the insurance carrier that would be liable for the claim. The only testimony in the record concerning claimant’s last day of work was in claimant’s discovery deposition taken April 28, 2005, when he said he thought his last day of work was February 28, 2004. Counsel for respondent (uninsured) indicated that it was his understanding that the last day claimant was on the payroll was February 25, 2004, and that there was a question whether claimant, in fact, worked anytime after February 19, 2004, the last day Continental had coverage for respondent. Although he was not under oath, a representative of respondent told the ALJ that the only way to establish claimant’s last day worked would be through his driver log. However, he said respondent is only required to keep those logs for six months, and the claimant’s logs are no longer available. Counsel for respondent/Continental also questioned whether claimant was accommodated during a period of coverage for one of respondent’s previous carriers.

Claimant was not present at the November 30, 2006, preliminary hearing. Counsel for respondent/Continental offered the discovery deposition of claimant to be considered as part of the record. Both counsel for respondent (uninsured) and counsel for the Fund objected, indicating they had not been involved in taking that deposition. The ALJ overruled the objections and allowed the discovery deposition testimony of claimant to be

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<sup>10</sup> P.H. Trans. (Nov. 30, 2006) at 6.

<sup>11</sup> ALJ Preliminary Decision filed June 9, 2003, at 1.

included as part of the record.<sup>12</sup> Respondent was provided notice of the discovery deposition and although its present counsel was not representing respondent at the time, notice and opportunity to be heard was provided to respondent. The Fund was not then a party to this claim. Nevertheless, neither counsel for respondent (uninsured) nor counsel for the Fund requested an opportunity to depose claimant or for the record to be held open for taking any other testimony or presenting any additional evidence. Accordingly, this Board Member finds that neither party was denied due process of law.

The Fund was properly impleaded into this case by claimant in May 2005 pursuant to K.S.A. 44-532a(a) and that pleading constituted a claim against the Fund for benefits by claimant. The fact that respondent and one of its insurance carriers requested the preliminary hearing, which is permitted by K.S.A. 44-534a, does not divest the ALJ of jurisdiction over the Fund or the subject matter of the preliminary hearing.

The ALJ found claimant's last day of work to be February 25, 2004, and determined that this would be claimant's date of accident for purposes of assigning liability for claimant's preliminary benefits. The ALJ further found that respondent was probably uninsured on that date. He then ordered the Fund to pay for claimant's ongoing treatment.

The public policy of the State is that workers compensation awards shall be promptly paid.<sup>13</sup> Preliminary hearings are not intended to be a forum to resolve disputes between insurance carriers concerning their respective liabilities.<sup>14</sup> That is why the Board has held, and continues to hold, that where the compensability of a claim is not at issue, a determination of a date of accident is not a jurisdictional issue when raised solely to assign liability as between multiple insurance carriers. The same applies when it is the Fund that seeks to have liability shifted away from a time period when respondent was uninsured to a date when an insurance carrier was on the risk. Although an ALJ is not required to apportion liability, the ALJ has the jurisdiction to do so.<sup>15</sup> It may have constituted error for the ALJ to assign liability to the Fund without first making a determination that the respondent had no insurance and is financially unable to pay the ordered compensation to claimant, but such an omission does not render the order invalid or subject to an appeal at this stage of the proceedings. As counsel are aware, the Board has stated on numerous occasions that its jurisdiction to hear appeals from preliminary hearing orders is limited.

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<sup>12</sup> The ALJ made a reference at pg. 17 of the Nov. 30, 2006, preliminary hearing transcript to an Exhibit 1, but there is no such exhibit listed or attached to the hearing transcript.

<sup>13</sup> *Acosta v. National Beef Packing Co.*, 273 Kan. 385, Syl. ¶ 11, 44 P.3d 330 (2002).

<sup>14</sup> *Tull v. Atchison Leather*, *supra* note 2.

<sup>15</sup> *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>16</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>17</sup>

K.S.A. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of temporary total disability compensation and medical treatment. Accordingly, the ALJ did not exceed his jurisdiction in entering his order of December 21, 2006, and the Board, therefore, does not have jurisdiction to review that order at this stage of the proceedings.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>18</sup>

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>19</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>20</sup>

**WHEREFORE**, it is the finding, decision and order of this Board Member that this appeal from the Supplemental Preliminary Order on Disputed Claim of Administrative Law Judge Robert H. Foerschler dated December 21, 2006, is dismissed.

**IT IS SO ORDERED.**

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<sup>16</sup> K.S.A. 2006 Supp. 44-551.

<sup>17</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>18</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>19</sup> K.S.A. 44-534a.

<sup>20</sup> K.S.A. 2006 Supp. 44-555c(k).

Dated this \_\_\_\_\_ day of March, 2007.

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BOARD MEMBER

- c: James E. Martin, Attorney for Claimant  
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier (Continental)  
Thomas R. Hill, Attorney for Respondent and its Insurance Carrier (TIG)  
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier (Commerce)  
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier (West Group)  
Peter J. Chung, Attorney for Kansas Workers Compensation Fund  
Mark E. Kolich, Attorney for Respondent (uninsured)  
Robert H. Foerschler, Administrative Law Judge